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SUBCONTRACTORS PAYMENT AUTHORIZATION FOR SERVICES AT THE GRAND CANYON NATIONAL PARK

APRIL 10, 2008.—Ordered to be printed

Mr. BINGAMAN, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

[To accompany H.R. 1191]

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 1191) to authorize the National Park Service to pay for services rendered by subcontractors under a General Services Administration Indefinite Deliver/Indefinite Quantity Contract issued for work to be completed at the Grand Canyon National Park, having considered the same, reports favorably thereon without amendment and recommends that the Act do pass.

PURPOSE

The purpose of H.R. 1191 is to authorize the Secretary of the Interior to make payments to subcontractors who performed work at Grand Canyon National Park in 2002 and 2003 but were not paid by the primary contractor.

BACKGROUND AND NEED

H.R. 1191 would authorize the Secretary of the Interior to pay approximately \$1.4 million from appropriated funds to subcontractors who worked on authorized construction projects at Grand Canyon National Park in 2002 and 2003, but who were not paid by the primary contractor, Pacific General, Inc. (PGI). After working on several projects for the park, PGI defaulted, leaving many of its subcontractors unpaid. Although PGI certified that it was making payments to its subcontractors, approximately \$1.4 million was never paid. National Park Service contracting policy required PGI to obtain payment and performance bonds; however it never did so.

The National Park Service paid PGI in full for all of the work orders. The Park Service contends that because it has made payment, and because it has no direct contractual relationship with the subcontractors, it has no legal authority to make additional payments to the subcontractors. Most of the subcontractors are small businesses and default has caused them significant economic hardship. In light of the equitable circumstances, H.R. 1191 would authorize the Secretary of the Interior to pay all of the subcontractors the remaining unpaid amounts.

LEGISLATIVE HISTORY

H.R. 1191, sponsored by Congressman Renzi, passed the House of Representatives by voice vote on April 17, 2007. (S. Hrg. 110–282.) The House of Representatives passed a similar measure in the 109th Congress, H.R. 3961. That bill was not considered in the Senate.

The Subcommittee on National Parks held a hearing on H.R. 1191 on November 8, 2007. At its business meeting on January 30, 2008, the Committee on Energy and Natural Resources ordered H.R. 1191 favorably reported, without amendment.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on January 30, 2008, by a voice vote of a quorum present, recommends that the Senate pass H.R. 1191.

SECTION-BY-SECTION ANALYSIS

Section 1 defines key terms used in the bill.

Section 2 authorizes the Secretary of the Interior, subject to the appropriation of such funds as may be necessary, to pay the amount owed to subcontractors of Pacific General, Inc. for work performed at Grand Canyon National Park in 2002 and 2003, if the primary construction contract between the Park Service and PGI is terminated; if the amount owed to the subcontractors is verified; where the subcontractors have exhausted all reasonable legal avenues to recover the amounts owed directly from PGI; and where the subcontractors provide a written statement that the verified amount due represents payment in full for the work performed.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

H.R. 1191—An act to authorize the National Park Service to pay for services rendered by subcontractors under a General Services Administration Indefinite Deliver/Indefinite Quantity Contract issued for work to be completed at the Grand Canyon National Park

H.R. 1191 would allow the National Park Service (NPS) to make payments to certain subcontractors associated with Pacific General, Inc. (PGI), a California-based firm for construction work performed in 2002 and 2003. The NPS has paid about \$10 million to PGI through a General Services Administration contract for numerous construction projects in Grand Canyon National Park; \$1.4 million

of that amount was owed but not paid to the firm's subcontractors. PGI has since gone out of business. The legislation would authorize the appropriation of such sums as may be necessary to pay the amount owed to the subcontractors.

Assuming the availability of appropriated funds, CBO estimates that implementing the legislation would cost the NPS \$1.4 million in 2008 to pay the subcontractors for their previous work. The legislation would not affect direct spending or revenues. The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 1191. The Act is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of H.R. 1191, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

H.R. 1191, as reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined by rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the National Park Service at the November 8, 2007 subcommittee hearing on H.R. 1191 follows:

STATEMENT OF KATHERINE H. STEVENSON, ACTING ASSISTANT DIRECTOR, BUSINESS SERVICES, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

Mr. Chairman, thank you for the opportunity to present the views of the Department of the Interior on H.R. 1191, a bill that would authorize the National Park Service to pay for services rendered by subcontractors under a General Services Administration Indefinite Deliver Indefinite Quantity Contract issued for work to be completed at the Grand Canyon National Park.

The Department appreciates the subcommittee's efforts to address this situation but opposes H.R. 1191. The Department also testified in opposition to H.R. 3961, a similar bill, in testimony before the House Subcommittee on National Parks on March 30, 2006.

H.R. 1191 would authorize payment, through the appropriation of such funds as are necessary, to subcontractors who completed work under task orders to Pacific General,

Incorporated (PGI) for which PGI was paid, but subcontractors were not. The work was completed under National Park Service (NPS) task orders issued against PGI's Indefinite Deliver Indefinite Quantity (IDIQ) contract with the General Services Administration.

PGI's default has created a financial burden on the affected firms. The NPS had a contractual relationship with the prime contractor, PGI. The NPS does not have a contractual relationship with the subcontractors and NPS does not have the legal authority to pay subcontractors who completed work under PGI's IDIQ contract for which PGI failed to render payment.

H.R. 1191 would authorize the Secretary to pay these subcontractors under certain conditions. The bill would authorize payment if: 1) the task orders issued to PGI by NPS have been terminated, 2) the amount owed to the subcontractors is verified, 3) all reasonable legal avenues or recourse have been exhausted by the subcontractors to recoup amounts owed directly from PGI, and 4) the subcontractors provide a written statement that payment of the amount verified represents payment in full by the United States for all work performed at the park under PGI task orders issued by NPS between Fiscal Years 2002 and 2003.

Between Fiscal Years 2002 and 2003, the Grand Canyon National Park (park) issued approximately 40 task orders to PGI under this IDIQ contract. Those task orders totaled an estimated \$17 million for various construction projects throughout the park. Invoices sent to the park indicated that PGI certified payments were being sent to subcontractors and suppliers. The NPS paid more than \$10 million to PGI, of which approximately \$1.4 million, based on our most recent estimates, was owed, but never paid, to subcontractors. PGI has been indicted by the U.S. District Attorney's Office in Arizona on 26 counts of fraud involved with these task orders.

In January 2004, the park began receiving complaints from subcontractors citing lack of payment by PGI. In February 2004, the NPS suspended further payment to PGI and issued a suspension notice ordering PGI to cease activity, followed by termination for default of 17 remaining task orders. PGI has had every reasonable opportunity to resolve the situation, but has since ceased doing business.

Following PGI's default, the NPS withheld payment to PGI and began paying subcontractors directly for work completed on PGI task orders, valued at \$906,335. Contract law generally prohibits payments directly to subcontractors because of the lack of a direct, contractual relationship between the parties. However, in this case, NPS consulted with the Government Accountability Office (GAO) and with their approval, began paying subcontractors directly for these claims. NPS has used approximately 92% of the withheld funds to pay 41 claims of an estimated total of 76 claims submitted.

The impact of PGI's default was compounded by lapses in the contracting operations at Grand Canyon National Park. An acquisition management review conducted by the NPS Washington Contracting and Procurement Office, determined that the park had failed to obtain payment and performance bonds from PGI required by the IDIQ contract and the Miller Act (40 U.S.C. § 3131). To prevent future lapses, we have strengthened internal controls both at the park and regional level. For example, the park superintendent is now annually evaluated for management of the park's contracting program. In addition, the NPS Intermountain Region will be conducting periodic acquisition management reviews of the Grand Canyon contracting program.

The Department understands the hardships PGI's default and NPS' actions have placed upon the involved subcontractors. The payment bonds required of the contractor under the Miller Act are designed to protect subcontractors who do not have the recourse of placing a lien on the property at issue, since liens cannot be placed on government property. The courts have held that, while the contractor has an obligation to provide such bonds, the Miller Act places no affirmative obligation on the federal government to ensure the bonds have been obtained. The Department recognizes that H.R. 1191 is intended to be an equitable resolution to a difficult situation. However, it singles out one situation for relief not available to others under the Miller Act and would effectively have NPS pay for the same services twice.

Although we are sympathetic about the position of the subcontractors, the Administration is concerned about the precedent that would be set by requiring the federal government to assume the liability for the contractor's default, particularly in a situation where no contractual relationship exists.

Mr. Chairman, this concludes my prepared remarks. I will be happy to answer any questions you or other members of the subcommittee might have.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the Act H.R. 1191, as ordered reported.